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In The

Supreme Court Of The United States

October Term, 1991

MAYOR JIM ROBERTS AND COUNCILPERSONS TERRY SCOTT, JOYCE GILLARD, VIOLET RAGLAND, TRUMAN CRANE AND BILL PARRISH, IN THEIR OFFICIAL CAPACITIES AS THE DULY ELECTED OFFICERS OF THE TOWN OF MORRIS, ALABAMA

Cross-Petitioners,

v.

JIM JOINER; JOHN MILNER

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statements made by Police Chief Joiner and Police Sergeant Milner, concerning the improper purchase of tires by town council members Frank Keith and Earl Peyton at a substantial discount through the town's account and for their personal use, is speech protected by the First Amendment of the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceedings below are listed in the caption. The presently listed mayor and council members of the Town of Morris are parties to this action in their official capacities only, as the duly elected representatives of the Town of Morris. Under state law they were automatically substituted for the originally-named mayor and council members when the originally-named officials of the Town left office after the commencement, and during the pendency, of the proceedings below.

This action was instituted against the Town of Morris through the following originally-named elected representatives in their official capacities only: Mayor Lamar Reid and council members Gene Chambers, Ed Reno and Charlie Lollar. The suit against the Town was also originally instituted through council members Earl Peyton and Frank Keith in their official capacities. Peyton and Keith were also sued in their individual capacities, but the cross-respondents later voluntarily dismissed them in their individual capacities due to their deaths and the cross-respondents' decision to forego claims against their probate estates.

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OPINIONS BELOW

The September 6, 1991 opinion of the Supreme Court of Alabama is reported at *Roberts v. Joiner*, 590 So.2d 195 (Ala. 1991), and is reprinted. The November 8, 1991 decision of the Supreme Court of Alabama denying, without opinion, the cross-respondents' application for rehearing is also reported at *Roberts v. Joiner*, 590 So.2d 195 (Ala. 1991). The November 16, 1990 order of the Trial Court, entering judgment on behalf of

the cross-respondents, is not reported and is reprinted at A.20-25 in the petition for writ of certiorari (No. 91-1497).

JURISDICTION

The decision of the Supreme Court of Alabama issued on September 6, 1991 became final, for purpose of review by this Court, on November 8, 1991 when the Supreme Court of Alabama denied, without opinion, the cross-respondents' application for rehearing. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The petitioners' application to extend the time for filing their petition for writ of certiorari was received by this Court on January 28, 1992. The addendum to the cross-respondents' application was received by the Court on January 30, 1992. On February 4, 1992 the Court extended the time for filing the petition for writ of certiorari to, and including, March 12, 1992. The petition for writ of certiorari was timely filed on March 12, 1992, pursuant to Rule 29.2. The cross-petition for writ of certiorari was received by cross-respondents on April 9, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). A.57.

STATUTES INVOLVED

This case involves U.S. Const. Art. VI cl. 2, U.S. Const. amend. I, U.S. Const. amend. XIV and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

In summary: (a) cross-respondents Joiner and Milner were doing a good job as police officers for the Town of Morris according to Mayor Lamar Reid (RT 493, 545-546); (b) the Town's retaliation against the officers started when the officers notified Mayor Reid of the improper tire purchases by two of the councilmen, not when the proposed 1984 budget was cut (RT 68-72, 287, 294-295); and (c) the Town council discharged the officers in retaliation for the officers' statements

concerning the improper tire purchases. *Roberts v. Joiner*, 590 So.2d 195, 202 (Ala. 1991).

Cross-petitioners[1] list a number of "problems" and imply that those "problems" were reasons for the officers' discharge. Cross-Pet. 9-10. Mayor Lamar Reid, however, testified at trial that, in his opinion, the Town cut the officers' pay and took away Joiner's insurance in retaliation for the officers reporting the improper tire purchases by councilmen Chambers and Keith. (RT 571-578). The Alabama Supreme Court stated that the officers presented "substantial evidence" that they had been discharged in retaliation for reporting the improper tire purchases. *Roberts v. Joiner*, 590 So.2d 195, 202 (Ala. 1991). Mayor Reid's testimony also confirmed that the officers were not discharged for the purported "problems" cited by cross-respondents, and that cross- respondents did not notify the officers of any specific charges being leveled against them. (RT 531-578; Joint Exhibit 10). Mayor Reid also testified that Joiner and Milner were doing a good job as police officers. (RT 493, 545).

Joiner was hired as police chief of the Town of Morris on August 10, 1978. (RT 42). Under Alabama law, Joiner could be discharged only for cause and only after being provided a hearing by the Town's council.[2]

Milner was hired by the Town as a police sergeant in 1982. (RT 282-283). Milner was hired under the Town's written personnel policy, which is reprinted at A.39-50.[3] The personnel

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[1] The cross-petitioners are referred to herein by name or, collectively, by "Town of Morris" or "Town". The cross-respondents are referred to herein as "Joiner and Milner" or as the "officers".

As used herein, citations to the Appendix to the petition for writ of certiorari are identified as "A."; citations to the cross-petition for writ of certiorari are identified as "Cross-Pet."; and, citations to the Reporter's Transcript of the trial below are identified as "RT".

[2] *See Ala. Code* § 11-43-160 (1975). A.61.; *Godwin v. City Council of the City of McKenzie*, 449 So.2d 1231, 1232 (Ala. 1984).

[3] The correct Appendix number for the Town's written personnel policy is A.45-56, rather than A.39-50 as shown in the Petition for Writ of Certiorari.

policy stated that new employees would serve a six-month probationary period. A.51. Under the personnel policy, employees attained "permanent employee" status after satisfactorily serving the probationary period. A.51-52. Permanent employees could be fired only for cause. The personnel policy provided a permanent employee with the "right to hold [his or her] job permanently, conditioned upon [his or her] continued satisfactory performance, honesty, loyalty, and the Town's ability to finance services. . . . " A.51-52. Milner successfully completed his probationary period and attained "permanent employee" status, whereupon he was promoted from patrolman to sergeant. (RT 284).

In October of 1983 the Town clerk showed Milner several invoices from the Goodyear tire store in Birmingham, Alabama.[4] (RT 63, 286-287). Those invoices showed that council members Earl Peyton and Frank Keith, as well as Keith's son, had purchased tires for their personal vehicles under the guise of buying tires for the Town of Morris. By purchasing the tires in the name of the Town, they were able to buy the tires at the substantially discounted price that was available to state and local governmental agencies through the state bid law. A.1-2. By purchasing the tires in the name of the Town, Peyton and the Keiths were also able to avoid paying state and federal taxes on the tires. (RT 69). The net result was that council members Peyton and Keith, as well as Keith's son, Bobby, were able to buy their $170.00 tires for approximately $40.00. (RT 68-69).

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[4]Photocopies of the five tire invoices were attached as Exhibit A to the petitioners' original complaint. The five photocopies were identified as plaintiffs' (petitioners') exhibits one through five at trial, and were admitted into evidence. The petitioners did not have the original tire invoices, and their photocopies of the invoices were of very poor quality. Due to the poor quality of the photocopies, they were not able to be adequately reproduced and reprinted for inclusion in the Appendix hereto. Based upon the testimony at trial, the photocopies of the five tire invoices established that council members Peyton and Keith, and Keith's son, Bobby, had purchased tires through the Town's account for their personal use. (RT 64-66, 86-91, 286-287).

Milner asked the Town clerk to make copies of the tire invoices, which he then turned over to his immediate supervisor, Joiner. (RT 287). Joiner took the tire invoices and reported the matter to the mayor, Lamar Reid. A.1-2. (RT 68, 287). Mayor Reid indicated to Joiner that he planned to ask Peyton and Keith to resign from the council. (RT 70-72).

A private meeting of the Town council was held on December 18, 1983 to resolve the tire issue. (RT 101-102). At that meeting it was agreed that council members Peyton and Keith would resign from the committee that purchased goods for the Town, and that they would pay the difference between the price that they actually paid for the tires and the price that they would have paid if they had not bought the tires in the name of the Town. A.2, 33. (RT 101-102).

Following the December 18, 1983 private meeting of the Town council, the mayor called Milner in and told him that the tire matter was over. (RT 294). Later that day, however, council member Keith told Milner that the tire matter was not over, that he was not through with Milner and that things were going to be a lot different regarding the police department. (RT 294-295). Keith said that he planned to take a much larger hand in running the police department than he ever had before. A.27. (RT 294-295).

A few minutes after Keith delivered his warning to Milner, council member Peyton came to Milner and said that the situation caused by the tire matter was not resolved, regardless of what the mayor had told Milner. (RT 295). Peyton also said that he was going to "get" Joiner and Milner. A.27. (RT 295).

Shortly before January 1, 1984, council member Keith ordered Joiner to find a reason to terminate petitioner Milner. (RT 109). Joiner refused, saying that Milner had not violated the personnel policy nor committed any wrongdoing that would justify terminating him. A.2. (RT 110).

At the next meeting of the Town council on January 10, 1984, Keith made a motion to cut the pay of the Town's full-time employees by five percent. A.2, 35. (RT 111-113). The

Town's only full-time employees were Joiner and Milner, police officer Frankie Witt and the Town clerk, Anna Grooms. A.2. (RT 112). Anna Grooms was the person who originally brought the improper tire purchases to the attention of Milner. A.2. (RT 286-287). The Town also had part-time employees, but Keith did not seek to cut their pay. A.35. (RT 111-112). Council members Keith, Peyton, Reno and Chambers voted in favor of the pay cut. A.35. Mayor Reid voted against the pay cut. A.35. Joiner and Milner were given no notice prior to the meeting that the council would consider a pay cut. (RT 117).

The reason given by the council for the pay cuts at the January 10, 1984 meeting was the Town's purported poor financial condition. A.2. (RT 522-523). Mayor Reid later admitted, however, that the Town was in good financial condition at the time the petitioners' pay was cut. (RT 529, 575). Joiner later informed the council that he thought the pay had been cut because he and Milner had reported the improper tire purchases. A.2. (RT 200). Mayor Reid testified at trial that he believed that Joiner's and Milner's pay was cut in retaliation for their speaking out about the tire purchases. (RT 577-578).

At a council meeting on February 28, 1984, the council decided that the Town should not be paying the health insurance premiums on Joiner's family. A.2-3, 38-39. Prior to the meeting Joiner was given no notice that the council would be considering whether to pay the insurance premiums. Joiner let the council know that he believed the action had been taken in retaliation for his reporting of the improper tire purchases. A.2-3.

At its meeting on March 13, 1984, the Town council adopted a resolution stating that there was "a problem" existing between the council and the police department. A.3. The resolution stated that the council would allow two weeks to find a solution to "the problems" and then, if no solution was found, the council would "bring its own solution to the table." A.3. The mayor said that the council was publicly recognizing

that there was a "problem" between the Town council and the police department, and that the council was willing to meet with the police department during the next two weeks to see if the "problems" could be resolved. A.3. (RT 122-123). Milner asked the mayor to explain the resolution, but neither the mayor nor the members of the council would explain what "problem" they were referring to in the resolution. (RT 327-328).

On March 15, 1984, Joiner and Milner met informally with the mayor and members of the council. A.3. (RT 300-301). Joiner asked for the pay cut to be rescinded. A.3. (RT 129). He also requested that the Town reinstate the health insurance for his family. A.3. (RT 129). The mayor and members of the council did not agree to these requests. A.3. (RT 129).

On March 23, 1984 the complaint initiating this action was filed. A.3. The complaint, with Exhibits B through D, is reprinted at A.26-39.[5] The complaint alleged that Joiner's and Milner's pay had been cut and that Joiner's family health insurance had been terminated in retaliation for reporting the improper tire purchases to the mayor. A.30. The complaint alleged that the actions of the defendants deprived Joiner and Milner of their property without due process of law and infringed upon Joiner's and Milner's right to free speech under the First Amendment to the Constitution of the United States. A.30. The complaint also asserted causes of action under state law. A.30-31.

The next regularly scheduled meeting of the Town council was held on March 27, 1984. (RT 136). At that meeting the council chamber was full of residents of the Town who were there to express their support for the police officers. (RT 137). Instead of discussing the purported police "problems" in the presence of the residents, the council voted to have a

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[5] See n.4 *supra* regarding the explanation for omission from Appendix of Exhibit A to the petitioners' original complaint.

closed meeting immediately following the regularly scheduled meeting. (Joint Exhibit 11). (RT 139). The minutes of the closed meeting reflect that the Town's attorney recommended that the council try to find out how the residents of the Town felt about the matter. (Joint Exhibit 11). The Town's attorney also recommended that Joiner and Milner be suspended with pay for thirty days. (Joint Exhibit 11). No official action was taken. (Joint Exhibit 11).

Two days later, on March 29, 1984, Joiner and Miller were fired at a specially called council meeting. A.4, 40. None of the council members notified Joiner and Milner of the specially called council meeting. Joiner learned of the meeting when he saw Anna Grooms, the Town clerk, crying at Town Hall on March 29. (RT 141-142). Joiner asked Ms. Grooms why she was crying, whereupon she told him that there was a council meeting that night and that the council was going to fire him. (RT 142). Milner learned about the council meeting when Joiner telephoned him and told him what he had learned from Anna Grooms. (RT 306). The phone call from Joiner was the only notification to Milner that there was going to be a specially called council meeting on the night of March 29, 1984. (RT 306).

When Joiner arrived at the council chamber on the night of the 29th he noticed that it was filled with relatives of the council members. (RT 143-144). When the meeting started, the mayor read a statement saying that the unspecified "problems" were still existing with the police department, but he did not say what the "problems" were. A.4. (RT 145). The mayor then said he would like to give Joiner and Milner an opportunity to resign. A.4. (RT 146). After the mayor had read the statement, Joiner told the mayor that he would like to know what the charges against him were. (RT 146-147). The mayor's response was "Well, there aren't any really." (RT 147). Joiner then said that he had done nothing wrong and would not resign. A.4. (RT 147). The council then allowed comments from residents and relatives of council members Keith and

Peyton.[6] (RT 147-148). The mayor and members of the council then voted to fire petitioners Joiner and Milner, effective immediately. A.4, 40. (RT 148). Council members Keith and Peyton, who had purchased tires through the Town's account, participated in all of the meetings and in all of the discussions leading up to the council's vote to fire Joiner and Milner, but abstained from the actual vote to fire Joiner and Milner. A.4. (RT 147-148). Mayor Reid testified at trial that he had decided to fire the petitioners sometime prior to the March 29th council meeting. (RT 498).

On April 27, 1984, the Officers filed their Supplemental Complaint, alleging that they had been discharged by the Town in retaliation for their statements concerning the improper tire purchases by council members Peyton and Keith. The Supplemental Complaint is reprinted at A.40-41. The Supplemental Complaint alleged that the discharge was in violation of Officers' rights under the First Amendment of the Federal Constitution. A.40.

On December 5, 1984, the Officers filed their Amended Complaint, alleging that they were "permanent employees" of, and had employment contracts with, the Town of Morris under the Town's personnel policy. A.42, 51-52. They also alleged, among other things, that the Town's failure to provide them notice and a hearing prior to being discharged was a violation of their rights of due process under the Fourteenth Amendment of the Federal Constitution, and that the violation gave rise to a cause of action under 42 U.S.C. § 1983. A.42-43. The Amended Complaint is reprinted at A.42-44. The Town's Personnel Policy is reprinted at A.45-56.

At trial, the Officers dismissed their state law claims and proceeded only on their claims under 42 U.S.C. § 1983. A.4. In addition to their claims under the First Amendment, the trial court submitted the Officers' Fourteenth Amendment claims to the jury on three theories: (1) that the pay cut was a

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[6] Council members Peyton and Keith had made the improper tire purchases.

deprivation of property without due process of law; (2) that the refusal to pay Joiner's family health insurance premiums was a deprivation of property without due process of law; and (3) that the Officers' employment was terminated without due process of law. A.4, 20-25. The due process claims were based upon the Town's failure to provide the Officers with notice of charges and a hearing on those charges before cutting their pay, eliminating Joiner's family health insurance, and terminating their employment. A.20-22. The jury returned a general verdict in favor of the Officers, awarding them each $100,000. A.1, 23. The trial court awarded Joiner an additional $25,430 for lost wages and insurance premiums, and Milner an additional $39,034 for lost wages. A.1, 23. The trial court also order the Town to reinstate Milner. A.1, 23.[7]

Finally, many of the "facts and issues" cited by cross-petitioners are of the type that they argued unsuccessfully in the trial court: they are merely frivolous attempts to distract this Court from the substantive issues in this case. It didn't work with the jury; it didn't work with the trial judge; it didn't work with the Alabama Supreme Court, and it shouldn't work here. A good example of this strategy is cross-petitioners' reference to the showing of "x-rated" movies at the city hall. Cross-Pet. 4. Yet, there is no evidence in the record that "x-rated" movies had anything to do with the firing of Joiner and Milner. In fact, the record shows that neither Joiner nor Milner were even present when the movies were shown. (RT 247-248, 355). Nevertheless, cross-petitioners believe it is in their interest to tell this Court that there were "x-rated" movies shown at the town hall while Joiner and Milner were employed as police officers for the Town. The fact that cross-petitioners believe it to be in their interest to cite such irrelevant facts typifies the poverty of their arguments.

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[7] Joiner dismissed his claim for reinstatement as police chief of the Town of Morris due to a work-related injury he suffered on another job after being terminated by the Town. As a result of the injury, Mr. Joiner became totally and permanently disabled.

REASONS FOR DENYING THE CROSS-PETITION

The Alabama Supreme Court determined that the statements of Joiner and Milner to Mayor Reid, concerning the improper tire purchases by councilmen Keith and Peyton, were protected speech under the First Amendment to the United States Constitution. The Alabama Supreme Court's decision does not conflict with the decisions of the United States Supreme Court and, therefore, the cross-petition should be denied.

I.

THE STATEMENTS MADE BY POLICE CHIEF JOINER AND POLICE SERGEANT MILNER, CONCERNING THE PURCHASE OF TIRES BY TOWN COUNCIL MEMBERS FRANK KEITH AND EARL PEYTON AT A SUBSTANTIAL DISCOUNT THROUGH THE TOWN'S ACCOUNT AND FOR THEIR PERSONAL USE, IS SPEECH PROTECTED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

In October, 1983, Officer Milner was first notified by the Town clerk of the improper tire purchases by council members Keith and Peyton. Milner turned the matter over to his immediate supervisor, Police Chief Joiner. (RT 287). Joiner then notified Mayor Lamar Reid about the improper tire purchases. (RT 68, 287). Mayor Reid indicated to Joiner that he planned to ask Peyton and Keith to resign from the council. (RT 70-72). At that point, the Town council's retaliation against Joiner and Milner began. (RT 68-72, 287, 294-295). The retaliation involved cutting the Officers' pay, disrupting their work schedules, terminating Joiner's family insurance and, finally, discharging the Officers without notifying them of the charges against them or providing them an opportunity to respond. (RT 111-113, 129, 294-295, 571-578) *Roberts v. Joiner*, 590 So.2d 195, 202 (Ala. 1991); (RT 531-578; Joint Exhibit 10).

The trial court correctly determined, as a matter of law, that the plaintiffs' statements to Mayor Reid about councilmen Keith and Peyton purchasing tires through the Town of Morris were protected under the First Amendment to the United States Constitution. A.21. (RT 467, 413-466). *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 282-284, 287 (1977); *Allen v. Autauga County Board of Education*, 685 F.2d 1302, 1304 (11th Cir. 1982); *Sykes v. McDowell*, 786 F.2d 1098, 1103-04 (11th Cir. 1986); *Kingsville Independent School District v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980); *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1098-1100 (5th Cir. 1987); *Wulf v. City of Wichita*, 883 F.2d 842, 856-859 (10th Cir. 1989); *Robb v. City of Philadelphia*, 733 F.2d 285, 295-296 (3rd Cir. 1984).

On appeal by the Town, the Alabama Supreme Court affirmed the decision of the trial court, holding that:

> . . . If it is determined as a matter of law that the speech is protected, the plaintiff must prove that the speech was a substantial or motivating factor in challenged employment decision. *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).
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> . . . Joiner and Milner's speech in turning in the councilmen for the improper tire purchases was a matter of public concern . . . [and] . . . Joiner and Milner's interest (as well as the public's), in the free speech involved in turning in Keith and Peyton outweighed any purported state interest in promoting the efficiency of public services. The law should not allow the Town to create problems with Joiner and Milner because of their reporting the improper tire purchases and then use the very problems it created as a basis for saying that it has a greater interest in efficiency of public services than Joiner and Milner have in free speech.

Roberts v. Joiner, 590 So.2d 195, 201, 202 (Ala. 1991).

In its decision, the Alabama Supreme Court further determined that:

> Joiner and Milner "presented substantial evidence that the speech was a substantial or motivating factor in the challenged employment decisions. Even the mayor of the Town said, both in his deposition and again at trial, that he thought the town council's actions were in retaliation for Joiner and Milner's telling about the improper tire purchases.

Id.

As police officers, sworn to uphold the law, Joiner and Milner had a duty to notify Mayor Reid about the improper tire purchases by council members Keith and Peyton. As police officers and citizens, Joiner and Milner also had the right, under the First Amendment, to tell the mayor that council members Keith and Peyton were using the Town's purchasing account for their personal financial gain. And, the Town council was not entitled to discharge Joiner and Milner in retaliation for their reporting of the improper tire purchases. *Rankin v. McPherson*, 483 U.S. 378, 383 (1987).

CONCLUSION

For the foregoing reasons, the cross-petition for writ of certiorari should be denied.

Respectfully submitted,

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